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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1108

PENELOPE E. CHART, a minor, by Richard E. Sommer, her Guardian ad Litem, and STANLEY A. CHART,

Petitioner,

vs.

RICHARD L. GUTMANN, by his Guardian ad Litem, Ralph Houseman, LEO J. GUTMANN, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin insurance corporation, GENERAL MOTORS CORPORATION, Chevrolet Division, a foreign corporation, SCHWISTER FORD, INC., a Wisconsin corporation, and VILAS COUNTY,

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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Penelope E. Chart

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin has not yet been reported. The opinion constitutes the record and is reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on October 28, 1969. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Whether a state statutory scheme, as interpreted by the highest state court, which allows tort suits against the state for injury caused by the negligent operation of a state owned aircraft and motor vehicles when a claim is disallowed by the legislature, but denied such right to sue by one injured due to negligent placement and maintenance of highway warning signs, although there is substantive liability for all torts on the part of the state, denies the latter tort claimant the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment Fourteen, Section I: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Constitution, Article Four, Section 27: "The legislature shall direct by law, in what manner and in what courts suits may be brought against the state."

Wis. Stat. Sec. 16.53(8). Claims Requiring Legislative Action:

> All claims of every kind against the state requiring legislative action shall be made in duplicate, in the manner provided in sub. (1) and shall be filed in the office of the director. The director shall examine the same, see if ordered by competent authority and if properly made, designate the fund to which they are chargeable. The director shall as soon as practicable refer such claims to the claims commission established under s. 16.007 for its findings of fact, its conclusions, and its report thereon to the legislature for action. Whenever a bill appropriating money for a claim becomes a law the director, before drawing his warrant therefor on the treasurer, shall see that the proper account on which such appropriation is based is filed in his office.

Wis. Stat. Sec. 16.007(1) Purpose:

There is hereby created a claims commission to receive, investigate and make recommendations on all claims presented against the state which are filed pursuant to s. 16.53(8). No claim or bill relating to such a claim shall be considered by the legislature until a recommendation thereon has been made by the claims commission.

Wis. Stat. Sec. 16.007(4) Procedure:

When a claim has been referred to the claims commission, it shall schedule such claim for hearing, giving the claimant at least 10 days' written notice of the date, time and place thereof. The commission shall keep a record of its proceedings, but such proceedings may be recorded by a permanent recording device without transcription. It may require sworn testimony and may summon and compel attendance of witnesses and the production of documents and records. Any member of the commission may sign and issue a subpoena. Three members shall constitute a quorum.

Wis. Stat. Sec. 16.007(6) Findings:

The commission shall report its findings and recommendations, on all claims referred to it, to the legislature for action. If from its findings of fact the commission concludes that any such claim is one on which the state is legally liable, or one which involves the causal negligence of any officer, agent or employe of the state, or one which on equitable principles the state should in good conscience assume and pay, it

shall cause a bill to be drafted covering its recommendations and shall report its findings and conclusions and submit the drafted bill to the joint committee on finance at the earliest available time. A copy of its findings and conclusions shall be submitted to the claimant within ten days after the commission makes its determination.

Wis. Stat. Sec. 16.007(7) Exception:

This section shall not be construed as relieving any 3rd party liability or releasing any joint tort-feasor.

Wis. Stat. Sec. 114.065 State Liability for Aircraft:

(1) Any person suffering any damage proximately resulting from the negligent operation of an aircraft owned and operated by the state, and which damage is occasioned by the operation of such aircraft in the performance of its business, may file a claim therefor against the state and the legislature shall have the right to allow, compromise, settle and pay the same; the claim shall state the time and place of the accident, a brief description of the injuries or damages, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed. "Business" as used herein means any business whether governmental or proprietary.

(2) No action to recover damages under this section shall be brought unless within 90 days after the date of the accident a claim is filed

for the damages sought or if the damages cannot be determined or ascertained, a notice of intention to file claim shall be filed within such 90 days, which notice shall contain a statement of the facts establishing the negligence upon which the claim is based and a description of the nature of the injuries or damages for which claim will later be filed.

(3) The manner and form and the place of filing such claims and notices shall be as provided in s. 16.53(8), except that they shall be made in triplicate; in addition to its duties under that subsection the department of administration shall transmit one of the copies of the claim or notice to the attorney general.

(5) Failure of the legislature to pass upon the claim within 60 days after presentation shall constitute a disallowance. Recess periods and periods between sessions due to sine die adjournments shall be included in arriving at said 60 days. Any such disallowance shall bar any action founded on the claim unless brought within 6 months after disallowance. Actions against the state and payment of the amount recovered shall be as provided in ss. 285.01 and 285.04.

Wis. Stat. Sec. 285.01. Actions Against State; Bond.

Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state by serving the summons and complaint on the attorney general or by leaving copies at his office and

by filing with the clerk of court a bond, not exceeding $1,000, with two or more sureties, to be approved by the attorney general, to the effect that he will indemnify the state against all costs that may accrue in such action and pay to the clerk of court all costs, in case he shall fail to obtain judgment against the state.

Wis. Stat. Sec. 285.04. Judgment, how paid.

No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any such action the clerk shall make and furnish the department of administration a duly certified transcript of such judgment; and the department of administration shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury.

Wis. Stat. Sec. 345.05. State and Municipal Liability for Motor Vehicle Accidents:

(1) In this section the following terms have the designated meanings:

(a) "Municipality" means any county, city, village, town, school district (as enumerated in s. 67.01(1)). sewer district, drainage district, community center and, without restriction because of failure of enumeration, any other political subdivision of the state.

(b) "Governing body" means the state legislature with reference to the state, the county board with reference to counties, and town board with reference to towns,

the legislative body of a city or village with reference to the cities and villages and the board of any district, center or other municipality with reference to other municipalities enumerated in par. (a).

(c) "Business" means any business whether governmental or proprietary.

(2) Any of the following may file a claim for damages against the state or municipality concerned and the governing body thereof may allow, compromise, settle and pay the same:

(a) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by the state or a municipality, which damage was occasioned by the operation of such motor vehicle in the course of its business. For the purposes of this subsection, a motor vehicle shall be deemed owned and operated by the state or a municipality if such vehicle is either being rented or leased, or is being purchased under a contract whereby the state or municipality will acquire title.

(b) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned or operated by the state through the agency of the Wisconsin national guard, the Wisconsin air national guard or the members or employes thereof when on state duty and whether paid from state or federal funds and which damage was occasioned by the operation of such motor vehicle in the performance of its business.

(3) The manner and form of and the place for filing claims shall be:

(a) If against the state, as provided in s. 16.53(8), with the department of administration.

(4) Failure of the governing body to pass upon the claim within 90 days after presentation constitutes a disallowance. Disallowance by the governing body bars any action founded on the claim unless brought within 6 months after disallowance. Actions against the state and payment of the amount recovered shall be as provided in ss. 285.01 and 285.04. For the purposes of this section, judgments against municipalities shall be certified, filed and collected as provided in s. 66.09 whether named therein or not.

STATEMENT OF THE CASE

Procedural History

The Petitioner was injured when the automobile in which she was a guest passenger missed a curve in the highway. Petitioner exhausted her remedies in the Wisconsin Claims Commission and in the Legislature. She sued, inter alia, the State of Wisconsin on the theory that the State had breached its duty to properly maintain highway warning signs and such breach was a proximate cause of her injuries. The State of Wisconsin demurred on the ground that, although there is no governmental immunity from substantive tort liability in Wisconsin, Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962), one may not sue the State unless the Legislature provides the relevant procedures, and such procedures did not exist in favor of Petitioner.

Petitioner opposed the demurrer, arguing that a statutory interpretation which prevented her from bringing suit would deny her equal protection. The trial court sustained the demurrer and based its decision in part on Forseth v. Sweet, 38 Wis. 2d 676, 158 N.W. 2d 370 (1968), which had rejected the equal protection argument.

On appeal, the equal protection argument was presented in the agreed statement of facts. The Wisconsin Supreme Court affirmed, stating,

> "Appellants are in the unfortunate position of having suffered a wrong for which there is no judicial remedy." (A. 37)

Statutory Scheme

The Wisconsin Constitution, Article IV, Sec. 27 provides that:

> "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

Wisconsin Statutes establish a claims commission to investigate claims against the state, Wis. Stats., Sec. 16.007(1), and allows the commission to make recommendations to the legislature, Wis. Stats. Sec. 16.007(7).

There are also specific provisions providing certain classes of tort claims. Wis. Stats. Sec. 114.065 allows one damaged due to negligent operation of a state owned and operated aircraft to file a claim in the legislature and bring suit against the state if the claim is disallowed. Wis. Stats. Sec. 345.05 provides for similar procedures for one damaged due to the negligent operation of a state owned and operated motor vehicle.

In the instant case the Wisconsin Supreme Court held that only those classes of tort claimants who are expressly granted the procedural right to sue the state may do so when a claim is disallowed, although substantive tort liability exists.

REASONS FOR GRANTING THE WRIT

1. A Writ of Certiori should be granted because the Wisconsin Supreme Court has decided a federal question of substance not previously decided by this court.

2. While the precise issue involved has not been before this court, the decision of the Wisconsin Supreme Court is contrary to the tenor of several cases decided in this court.

The proper characterization of the effect of the decision below is critical in this case. That decision has created a roadblock to the judicial process as regards some tort claimants, although others have full access. Those injured by the negligent operation of state owned and operated aircraft or motor vehicles may sue the state in tort, but those injured by the state through less dramatic means may not. Resolution of the constitutional issue thus created is important, not only to Petitioner, but to all other potential tort claimants in the State of Wisconsin and in any other state which has or might adopt such a system.

The creation of the Wisconsin system has established definite classifications. Many forms of classification are constitutionally permissible,

> "But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' Baxstrom v. Herold, 383 U.S. 107, 111; Carrington v. Rusk, 380 U.S. 89, 93;

> Louisville Gas Co. v. Coleman, 277 U.S. 32, 37; Royster Quano Co. v. Virginia, 253 U.S. 412, 415."
>
> Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

In the instant case, the purpose for the classification is not apparent. It is true that the burden is ordinarily on the one asserting non-equality, Fay v. New York, 332 U.S. 261 (1947), but

> "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas Co. v. Coleman, 277 U.S. 32, 37-8; Hartford Co. v. Harrison, 301 U.S. 459, 462."
>
> Morey v. Doud, 354 U.S. 457, 464 (1957).

The classification here involved is not only of an unusual character, but its discriminatory nature is obvious. The state is substantively liable to all, yet only those who suffer injuries of a particular nature are granted procedural standing.

Decisions of this court have created a requirement of equality in procedural standing. In Rinaldi v. Yeager, 384 U.S. 305 (1966), the state required prisoners who had taken an unsuccessful appeal to pay for the transcripts which they had used out of their prison pay. Those who had been convicted of crimes but had not been imprisoned and had taken an unsuccessful appeal were not so required to pay for their transcripts. This court held that the scheme was a constitutional failure because inmates who had

taken an unsuccessful appeal were denied equal protection of the laws by that classification. It was stated that:

> " . . . all that distinguishes them from their institutionalized counterparts is the nature of the penalty attached . . . ".
> 384 U.S. 305, 309.

Another case involving procedural classifications resulting in a bar to access to the judicial process was Glona v. American Guaranty & Liability Insurance Co., 391 U.S. 73 (1968). In that case it was held that the state may not deny an illegitimate child the right to sue for wrongful death.

In the foregoing cases, the classifications were unreasonable, someone was discriminated against by being barred access to the judicial process, and in addition they were unable to effect their class position. Such is the case here.

The classification here involved is entirely arbitrary in that it is based upon the nature of the instrument which caused the injury. It has nothing to do with any particular relationship between the claimant and the State of Wisconsin. The critical factor is whether the claimant was injured by an aircraft or automobile, or by some other means. This classification discriminates against Petitioner by denying her access to the judicial process, there is no apparent rational basis for the distinction, and in addition Petitioner is unable to effect within which class she falls. This combination of factors results in a denial of equal protection of the laws.

It is no answer that there is a history of sovereign immunity within the states, because, first, that has been totally abolished in the State of Wisconsin. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N. W. 2d 618 (1962). In addition, this court has, " . . . not hesitated to strike down an invidious classification even though it had history and tradition on its side." Levy v. Louisiana, 391 U.S. 68, 71 (1968). And what is most important is that the State of Wisconsin has opened the road to suit against the State, even though it might not have had to originally. It cannot now allow access to some while denying it to others.

> " . . . It is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. Illinois, 351 U.S. 12; Douglas v. California, 372 U.S. 353; Lane v. Brown, 372 U.S. 477; Draper v. Washington, 372 U.S. 487."

Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

This case should be distinguished from those cases dealing with regulatory statutes. It is true that in that area,

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

This is true because in the regulatory field it would be virtually impossible to require the State to regulate all evils of the same type through the same legislative scheme. Only experimentation and experience can direct the legislature in arriving at a wise and workable regulatory scheme.

But such is not the situation here. We are dealing, not with the regulatory system, but with a system which denies to some the equal access to the courts, even though substantive liability exists in favor of all.

SUMMARY

The procedural scheme recognized by the court below denies Petitioner equal protection of the laws because:

1. She is in the class discriminated against;

2. There is no apparent reason for such classification in the procedural area, as opposed to the regulatory area;

3. It is beyond Petitioner's power to effect which class within which she will fall, and that is the epitomy of arbitrariness.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this court to grant the Writ of Certiorari to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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Guardian ad Litem for
minor Plaintiff-Petitioner
Penelope E. Chart

APPENDIX

OPINION

APPEAL from an order of the circuit court for Vilas county: LEWIS J. CHARLES, Circuit Judge of the Fifteenth circuit, Presiding. Affirmed.

The plaintiffs' complaint alleges in part that on July 30, 1966, an automobile accident occurred in Vilas county, Wisconsin, and that the state of Wisconsin, through action or inaction of its agents and employees, was causally negligent with respect to the posting of certain highway warning signs. The state of Wisconsin demurred to the complaint. The appeal from this order is pursuant to sec. (Rule) 251.28, Stats., and both parties stipulated and agreed to the following statement of facts:

"1. That within 120 days of the date of said accident in question, plaintiffs caused to be served on the State of Wisconsin a notice of injury and claim for damages, pursuant to sec. 895.43, Wis. Stats., by service on the Attorney General's office for the State of Wisconsin.

"2. That, pursuant to said claim for damages, a hearing was held before the State Claims Commission on or about December 9, 1966.

"3. That on or about January of 1967, the State Claims Commission denied the claim of plaintiffs above on its merits.

"4. That thereafter, on or about November 15, 1967, Senate Bill No. 555 was introduced in the Wisconsin State Senate, the purpose of said Bill being to appropriate the sum of $550,000.00 from the State highway fund in payment of the claims made against the State of Wisconsin by the plaintiffs herein.

That the Wisconsin Senate, by virtue of legislative procedures, indefinitely postponed said Bill, the legal effect of which was to deny or kill Senate Bill No. 555.

"5. That on or about November 15, 1967, Senate Bill No. 556 was introduced in the Wisconsin State Senate, which Bill would have permitted suit against the State of Wisconsin in the Circuit Court for Vilas County by the plaintiffs against the defendant, State of Wisconsin, for negligent acts committed by State employees in the normal course of their duties, which negligence resulted in injuries to plaintiffs above. That the Wisconsin State Senate referred Bill No. 556 to the Committee on Judiciary and, thereafter, the State Legislature did adjourn until January 1969, at which time the Wisconsin State Senate, upon reconvening, will move to adjourn sine die, the legal effect of which will be to kill all bills still in Committee, including Bill No. 556.

"6. That after the Wisconsin State Senate denied Senate Bill No. 555 by legislative action, the plaintiffs herein commenced suit against the State of Wisconsin in the Circuit Court for Vilas County, Wisconsin by service of a Summons and Amended Complaint on the Attorney General's office for the State of Wisconsin.

"The precise questions of law which the appellant will rely on for purposes of this appeal are as follows:

"A. That the present applicable statutory sections expressly contemplate and authorize suit against the State of Wisconsin where the claims

procedure has been complied with in full and the Legislature has expressly denied the claim. Article IV, Section 27 of the Wisconsin Constitution notwithstanding.

"B. The Wisconsin Legislature by virtue of enacting Section 16.53; 16.007; 285.01; 345.05; 114.065, has waived the right of the State of Wisconsin to be immune from suit by tort claimants.

"C. That to deny plaintiffs herein the right to commence suit against the State of Wisconsin amounts to a denial of equal protection of the law under Article I, Section 9 of the Wisconsin Constitution and the 14th Amendment to the United States Constitution.

"D. That the doctrine of Houston vs. the State, 98 Wis. 481, has been expressly and/or impliedly overruled by Holytz vs. Milwaukee, 17 Wis. 2d 26.

"E. That substantive law and public policy requires that every right shall have an enforceable remedy and, therefore, the doctrine of Holytz vs. Milwaukee should be reinforced by permitting indirect suit against the State of Wisconsin once the procedural steps involving claims against the State have been complied with by a prospective tort claimant.

"F. That Article IV, Section 27 of the Wisconsin Constitution has been implemented to the necessary degree to permit a tort claimant to sue the State of Wisconsin by virtue of the statutory pattern which presently exists with respect to claims, claims procedure, and Section 285.01.

"That in addition to the Summons, the Amended Complaint, the Demurrer by the State of Wisconsin to the Amended Complaint, the Memorandum Decision rendered by the Trial Court on July 30, 1968, the Order sustaining the Demurrer entered by the Court on September 21, 1968, the Notice of Appeal and Waiver of Undertaking, the foregoing stipulated facts constitute the agreed case for purposes of this appeal."

WILKIE, J. The question involved in this appeal as agreed to by the parties is: Whether or not a tort claimant who has exhausted the statutory-claims procedure and in addition has introduced appropriate legislation in the state legislature to appropriate compensation for injuries received, which legislation subsequently failed to pass said state legislature, may then commence suit in a circuit court in this state for the recovery of money damages against the state of Wisconsin.

This case once again presents an attack on the venerable doctrine of governmental immunity from suit by tort claimants in the absence of consent.

The Wisconsin Constitution, art. IV, sec. 27, provides:

"The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

It is undisputed that since Holytz v. Milwaukee[1] there is substantive liability imposed upon the state

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[1] (1962), 17 Wis. 2d 26, 115 N. W. 2d 618.

when its agents, in the course of their employment, commit a tort. This court in that case said:

"Henceforward, there will be substantive liability on the part of the state, but the right to sue the state is subject to sec. 27, art. IV, of the Wisconsin constitution . . . . The decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the constitution to be sued only upon its consent." (Emphasis added.)[2]

Then in Forseth v. Sweet,[3] this court, recognizing that the above quoted constitutional provision was not self-executing but needed legislative implementation, found "no statutory pattern that would lead us to conclude that the legislature has expressly or impliedly acted under art. IV, sec. 27, to direct in what manner and in what courts suits may be brought against the state."[4]

The appellant here attempts to avoid the impact of Forseth by arguing that the instant case can be factually distinguished from Forseth since here, unlike Forseth, appellants have exhausted the statutory-claims procedure, including denial by the state legislature, before commencing suit against the state.

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[2] Id. at page 41.

[3] (1968), 38 Wis. 2d 676, 158 N. W. 2d 370.

[4] Id. at page 685.

Our first inquiry must be whether there is historical authority which would permit tort claimants to sue the state. The short answer is: "No."

Sec. 285.01, Stats., as it exists now, is substantially the same as when it was first enacted in 1850.[5] This statute now provides:

". . . Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state by serving the summons and complaint on the attorney-general. . . ."

This court in Dickson v. State[6] upheld the validity of this statute. Then in 1881 this court decided the Chicago, Milwaukee & St. Paul Ry. Co. v. State Case.[7] In that case the plaintiff railroad company commenced an action in the supreme court pursuant to the statute as it then existed.[8]

[5] See Ch. 249, Laws of 1850, which provided: "Sec. 1. That hereafter it shall be competent for any person or persons, deeming him, her, or themselves, or any body politic, deeming itself aggrieved by the refusal of the legislature to allow any just claim against the state, to exhibit and file a petition . . . with the clerk of the supreme court, ..."

[6] (1853), 1 Wis. 110 (*122).

[7] (1881), 53 Wis. 509, 10 N. W. 560.

[8] R. S. 826, sec. 3200.

The action sought to restrain the state of Wisconsin from collecting certain license fees payable by the railroad to the state of Wisconsin under the then existing law. The state of Wisconsin by the attorney general demurred to the complaint on the grounds (1) that the court had no jurisdiction of the person of the defendant or the subject matter of the action, and (2) that the complaint did not state facts sufficient to constitute a cause of action.

In its decision the court first held that since the complaint failed to allege performance of the condition precedent to bringing suit, i.e., refusal by the legislature to honor the claim, the complaint was fatally defective and this defect could be reached by general demurrer. Hence, the state's demurrer was well taken and the court said it did not consider the case on the merits.

Nevertheless, the court then went on to say that this action was not authorized by the statute.

". . . It is manifest from the language of the section [sec. 3200], and from the whole chapter of which the section is a part, that the statute relates only to actions upon those ordinary claims against the state which, if valid, render the state a debtor to the claimant; and not to an equitable action brought directly against the state to restrain it from perpetrating an alleged threatened injustice." (Emphasis added.)[9]

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[9] Chicago, Milwaukee & St. Paul Ry. Co. v. State, supra, footnote 7, at page 512.

The court also said that the above constitutional provision was not self-executing and, therefore, in order for an action of any kind to be maintained directly against the state, it must be authorized by some statute of the state.

Thus, by way of dicta in this opinion the court set forth two important principles:

1. That art. IV, sec. 27, of the Wisconsin Constitution is not self-executing, but rather in order for there to be a suit against the state, it must be authorized by some statutory enactment, and

2. That the statute in question relates only to those types of claims which, if valid, would make the state a debtor to the claimant.

This dicta was subsequently elevated to the status of controlling precedent by this court's decision in Houston v. State.[10] In that case a state veterinarian had negligently tested milk cows for tuberculosis and ordered their destruction. After their destruction it was determined that the cows were healthy and not diseased. The owner submitted a claim to the legislature which was denied. Then suit was commenced in the supreme court for money damages. The state demurred on the grounds that plaintiff lacked legal capacity to sue and that the complaint failed to state a cause of action. This court in sustaining the demurrer, and citing the Chicago, Milwaukee & St. Paul Ry. Case, held that the statute, which was the predecessor of the present sec. 285.01, Stats.,

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[10](1898), 98 Wis. 481, 74 N. W. 111.

". . . only relates to claims which, if allowed, render the state a debtor to the claimant. . . . This statute does not include a demand based upon the unlawful and tortious acts of officers or agents of the state. . . ."

". . . this action for the alleged unlawful and tortious action of the officers and agents of the state cannot be maintained against the state, for the simple reason that the legislature has never authorized an action in this court for such misconduct."[11]

The most recent interpretation of the Houston Case appears in Forseth v. Sweet,[12] wherein this court stated:

". . . The Houston Case rests in part upon the fact that there is no substantive liability upon the state, a position since modified in Holytz, but a careful reading of the case makes it clear that the decision was primarily based upon the failure of the legislature to provide a procedure for suit."[13]

The appellants in the instant case do not quarrel with this position as stated in Forseth, but rather, strenuously argue that Houston was erroneously decided in the first place and that it can no longer be cited as authority for the preposition that the legislature has failed to provide a procedure for

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[11] Id. at pages 487-488.

[12] Supra, footnote 3.

[13] Id. at page 683.

suit against the state of Wisconsin. In other words, appellants argue that the word "claim" as it appears in the statute was erroneously limited to claims that make the state of Wisconsin a debtor to the claimant. The word "claim" they argue also encompasses tort claims and thus the same procedure used by creditor claimants to sue the state, i. e., sec. 285.01, Stats., is available to tort claimants.

Appellants contend that the proper decision in the Houston Case would have been to find that a procedure for tort claimants to sue the state did exist, but that tort claimants were not within the purview of the statute granting such permission since sovereign immunity to tort liability still existed. The anomaly of a decision of this type which would say (1) yes, the state has agreed to allow tort claimants to sue it by the procedure provided in sec. 285.01, Stats., but (2) no, tort claimants cannot collect because there is sovereign immunity to tort liability, makes this position untenable.

We think that Houston was correctly decided. The fact is that this decision has been bolstered by seventy-one years of further judicial decisions[14] and seventy-one years of legislative acquiescence in this interpretation.

As this court said in Zimmerman v. Wisconsin Electric Power Co.:[15]

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[14] See, Holzworth v. State (1941), 238 Wis. 63, 298 N. W. 163; Petition of Wausau Inv. Co. (1916), 163 Wis. 283, 158 N. W. 81.

[15] (1968), 38 Wis. 2d 626, 157 N. W. 2d 648.

". . . Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; for the principle of the courts' decision--legislative intent--is a historical fact and, hence, unchanging. Thus, when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct. This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function."[16]

Thus, it would appear that sec. 285.01, Stats., does not now, nor has it ever provided a procedure by which tort claimants may sue the state.

Even now there are present legislative efforts to introduce such a procedure. There is presently before the senate of the state of Wisconsin, Senate Bill No. 6.[17] Sec. 285.02 of this proposal provides:

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[16] Id. at pages 633-634. See also Hahn v. Walworth County (1961), 14 Wis. 2d 147, 154, 109 N. W. 2d 653; Meyer v. Industrial Comm. (1961), 13 Wis. 2d 377, 382, 108 N. W. 2d 556.

[17] Referred to Committee on Finance on February 18, 1969.

"285.02 Consent to Suits Against the State; Exceptions. (1) The sovereign immunity of the state from suit is waived except as specifically reserved by this chapter.

"(2) The state reserves its sovereign immunity from suit and no action may be maintained:

"(a) Against the state for the intentional torts of its employes unless the employe acted in good faith and in the scope of his employment.

"(b) Against the state or its employes, if founded on tort and based upon acts or omissions done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

"(c) Against the state for injuries resulting from insufficiency of maintenance of state highways, bridges or roads which the state is obligated to maintain and which a county, city or village by law or by agreement is obligated to maintain. For the purpose of this paragraph, the definition of maintenance in s. 84.07 (1) applies.

". . .

"(3) Where immunity from suit is waived, consent to be sued is granted and the liabilities, defenses and remedies of the state shall be determined as if the state were a private person, except that the state shall not be liable for punitive damages.

"(4) In any action founded on tort against the state or its employes the amount recoverable for an injury shall not exceed $100,000 for each individual, or $1,000,000 for each occurrence.

"(5) Nothing in this chapter shall be construed as an admission of liability by the state.

"(6) Where a remedy against the state is provided elsewhere in the statutes, the provisions of the statutes providing the remedy shall control and be followed."[18]

The Note following this section contains the following language:

"Section 285.02 contains the substantive provisions of ch. 285. Sub. (1) is a broad waiver of immunity from all actions including tort, contract, etc. Subs. (2) and (6) contain the only limiting provisions.

"Sub. (2)(a) differs from most state immunity statutes in that recovery against the state can be had for intentional torts in certain situations. Section 270.58 as amended by ch. 603, laws of 1965, contains a similar provision. That section provides for indemnification of state and municipal employes for any judgment provided they acted in good faith and in the scope of their employment. There are no limitations on intentional torts. To the contrary, ch. 438, laws of 1959, deleted a provision in s. 270.58 excepting false arrest actions as a basis for indemnification. This bill amends s. 270.58 by deleting all references to the 'state'. (See SECTION 24)

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[18] Senate Bill No. 6, pp. 19 - 21.

"Sub. (2)(b) adopts the limitations on suit presently found in s. 895.43(3) (formerly s. 331.43(3)) relating to municipal liability. This phraseology gives considerable flexibility to the court since the municipal section has had virtually no interpretation and the common law generally did not draw this distinction. Whether one is performing a judicial, quasi-judicial, legislative or quasi-legislative function should turn on whether the element of discretion exists in the performance of such function. The policy underlying sub. (2)(b) is not to deter public officials from making reasonable policy decisions requiring a certain degree of judgment.

"Sub. (2)(c) has been included to clarify the law relating to liability for defective roads. It is clear that a county may be held liable for negligent maintenance of a state highway provided the county contracted with the state highway commission to maintain the highway. See Dunwiddie v. Rock County, 28 Wis. (2d) 568 (1965). However, there is doubt whether this liability would extend to the state assuming immunity were waived. This bill absolves the state from negligent maintenance by the county of state roads on the theory that the county is acting as an independent contractor. SECTION 19 of the bill amends s. 84.07 to codify the Dunwiddie decision.

". . .

"Holytz v. City of Milwaukee, 17 Wis. (2d) (1962) abrogated sovereign immunity against the state (the declaration was dictum since the state was not a party to the action) but did not, and could not, waive the constitutional requirement that the legislature consent to suits against the state. Artivle IV, sec. 27. Sub. (3) along with sub. (2) makes it clear

that these substantive and procedural barriers no longer exist.

"Sub. (4) places a monetary limitation on actions against the state. Sub. (5) makes it clear that none of the language of this chapter is an admission of state liability.

"Sub. (6) recognizes that many existing statutes provide for remedies against the state. Since many of these statutes provide for different procedures than those established in ch. 285, the existing statutes shall control. Examples of statutes not within the purview of ch. 285 are: ch. 32 relating to eminent domain; ch. 88 relating to farm drainage; ss. 267.23 and 304.21 dealing with garnishment of public employes; s. 276.48 concerning partition of lands where the state is a cotenant; and various statutes authorizing suits against the state for refunds from unlawful tax collections."[19]

This proposal indicates that the legislature does not think that the present sec. 285.01, Stats., provides a procedure for tort claimants to sue the state as the appellants argue.

Our second inquiry is whether there are other provisions which, coupled with sec. 285.01, Stats., permit the bringing of a tort action against the state.

Appellants argue that certain sections of ch. 16, Stats., coupled with sec. 285.01, provide the key to the courtroom door and permit a tort claimant to sue the state.

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[19] Id. at pages 21-23.

Sec. 16.53(8), Stats., provides in part:

"All claims of very kind against the state requiring legislative action . . . shall be filed in the office of the director. The director shall examine the same, see if ordered by competent authority and if properly made, designate the fund to which they are chargeable. The director shall as soon as practicable refer such claims to the claims commission established under s. 16.007 for its findings of fact, its conclusions, and its report thereon to the legislature for action. . . ." (Emphasis added.)

Sec. 16.007(1), Stats., creates a claims commission to:

". . . receive, investigate and make recommendations on all claims presented against the state which are filed pursuant to s. 16.53(8). No claim or bill relating to such a claim shall be considered by the legislature until a recommendation thereon has been made by the claims commission."

Finally, sec. 16.007(6), Stats., provides in part:

"The commission shall report its findings and recommendations, on all claims referred to it, to the legislature for action. If from its findings of fact the commission concludes that any such claim is one on which the state is legally liable, or one which involves the causal negligence of any officer, agent or employe of the state, or one which on equitable principles the state should in good conscience assume and pay, it shall cause a bill to be drafted covering its recommendations and shall report its findings and conclusions and submit the

drafted bill to the joint committee on finance at the earliest available time. . . ." (Emphasis supplied)

Assuming that these sections apply, as they apparently do,[20] to tort claims, the question arises: What happens when the legislature takes no action or fails to pass the recommended bill?

Appellants contend that upon legislative failure to pass upon the claim or inaction by the legislature, sec. 285.01, Stats., is triggered and then the tort claimant can sue the state under the provisions of that statute.[21]

This argument is not without force, but in order for this court to accept it, it would have to ignore the preceding discussion wherein it was seen that sec. 285.01, Stats., was limited to those claims which, if valid, would make the state a debtor to the claimant.[22]

Nevertheless, appellants insist that all the cases which so limited sec. 285.01, Stats., can be distinguished from the instant situation, since they were decided prior to the establishment of the claims procedure of ch. 16, Stats., and/or they all involved

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[20] See sec. 16.007(7), Stats., which provides: "This section shall not be construed as relieving any 3rd party liability or releasing any joint tort-feasor."

[21] See secs. 114.065(5) and 345.05(4), Stats.

[22] See Houston v. State, supra, footnote 10, and accompanying text.

direct suits against the state with no attempted compliance with the statutory claims procedure as here. Also, appellants argue that secs. 114.065 and 345.05 permit suits against the state pursuant to sec. 285.01, when the legislature has failed to act upon or has denied a claim arising out of damages caused by the negligent operation of a state-owned aircraft or state-owned motor vehicle. Thus, appellants contend that since the state has waived its immunity to suit in those situations, it should be deemed to have waived its immunity to suit in the limited situation here presented, i.e., where a tort claimant has followed the statutory-claims procedure and has obtained no relief.

The obvious distinction between these situations can be drawn. Both secs. 114.065 and 345.05, Stats., specifically provide that sec. 285.01 is to be utilized if the legislature fails to act or denies the claims made thereunder.[23] Moreover, both those sections deal specifically with the negligent operation of state owned and operated apparatus--aircraft and motor vehicles respectively.

In ch. 16, Stats., there is no specific directive that sec. 285.01 is to be utilized if the legislature fails to act or pass the claim. Similarly, no state owned or operated apparatus is involved here.

This distinction likewise disposes of appellants' contention respecting denial of equal protection of the laws.

Appellants are in the unfortunate position of having suffered a wrong for which there is no judicial remedy.

By the Court.--Order affirmed.

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[23] See secs. 114.065(5) and 345.05(4), Stats.